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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. GOOGLE, INC., Defendant.	OALJ Case No. 2017-OFC-00004 OFCCP No. R00197955

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MAR 03 2017
Office of Administrative Law Judges
San Francisco, Ca

OFCCP'S BRIEFING REGARDING THE AUTHORITY OF THE ALJ TO MODIFY OFCCP'S REQUESTS[1]

The only matter properly before this Court is whether OFCCP's off-site document requests are within the scope of the access provision Google contractually agreed to in exchange for millions of dollars of taxpayers' money. *Zap v. United States*, 328 US 624 (1946) 330 U.S. 800 (1947). Because, by the contract's unambiguous terms, the answer to this question is yes, this Court has no authority to modify OFCCP's request. Moreover, the Secretary's regulations expressly delegate plenary authority to the Deputy Assistant Secretary for OFCCP ("Director"), not the Administrative Review Board, with respect to "carrying out the responsibilities assigned to the Secretary under the Executive Order." 41 C.F.R. 1.2. Additionally, the regulations vest the authority with respect to the determination of whether a document request is relevant with the Regional Director, OFCCP. 41 C.F.R. 1.20(f).

[1] As directed by the Court on February 28, 2017, Plaintiff Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP") submits this brief regarding the authority of the Court to modify OFCCP's requests in this matter.

1) OFCCP's document requests are clearly within the scope of the access provision that Google agreed to in exchange for federal business, and thus, cannot be modified.

This Court must enforce a search where the request is within the scope of a contractual obligation to provide access.[2] Google is a large, wealthy and sophisticated company. It had access to, and presumably made use of, extensive legal resources in deciding to enter into a contract with the federal government. Google acknowledged that its contract "reflects the outcome of negotiations between Google and" the General Services Administration.[3] That contract includes an agreement by Google to "permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order."[4]

OFCCP's requests in this matter are profoundly non-controversial with respect to their obvious relevance an OFCCP review of compliance with Executive Order 11246 and thus fall well within the contractually provided access provision. OFCCP merely seeks compensation data, job and salary history for employees in the review period, and contact information for those employees. These items are clearly at the very core of an investigation that seeks to determine

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[2] *See Tri-State Steel Const., Inc. v. Occupational Safety & Health Review Comm'n*, 26 F.3d 173 (D.C. Cir. 1994) *cert. denied* 510 U.S. 1015 (1995) (OSHA inspection); *Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984) (same); *Colonnade Catering Corp. v. United States*, 410 F.2d 197, 203 (2nd Cir. 1969) *rev'd on other grounds,* 397 U.S. 72 (1970) (IRS seizing alcohol); *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61, 66 (3rd Cir. 2001) (employee urinalysis); *United States v. Griffin*, 555 F.2d 1323, 1324 & n.1 (5th Cir. 1977) (welfare fraud); *United States v. Jennings*, 724 F.2d 436, 448 (5th Cir. 1984) (food stamps fraud); *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005) (probation); *United States v. Brown*, 763 F.2d 984, 987-88 (8th Cir. 1985) *cert. denied* 474 U.S. 905 (1985) (medicaid records); *Yin v. State of Cal.*, 95 F.3d 864, 872 (9th Cir. 1996) (independent medical evaluation pre-employment);*United States v. Seljan*, 328 F. Supp. 2d 1077, 1085 (C.D. Cal. 2004) *aff'd,* 497 F.3d 1035 (9th Cir. 2007) *aff'd en banc*, 547 F.3d 993 (9th Cir. 2008) *cert. denied* 555 U.S. 1195 (2009) (customs seizing pornography);*United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006) (pre-trial release conditions); *United States v. Rucinski*, 658 F.2d 741, 745 (10th Cir. 1981) *cert. denied* 455 U.S. 939 (1982) (Forest Service inspection); *United States v. Smith*, 353 F. App'x 229, 231 (11th Cir. 2009) (storage unit contract); *United States v. Yeary*, 740 F.3d 569, 583 (11th Cir. 2014) *cert. denied,* 135 S. Ct. 1153 (2015) (house arrest agreement); *United States v. Teeven*, 745 F. Supp. 220 (D. Del. 1990) (*subpoena duces tecum* issued by Department of Education); *Copar Pumice Co., Inc. v. Morris*, 632 F. Supp. 2d 1055 (D.N.M. 2008) (environmental protection inspection); *United States v. Schleining*, 2015 WL 1593007 (N.D. Ill. 2015) (unreported) (USPS audit).

[3] Declaration of Marc Pilotin in support of Plaintiff's Motion for Summary Judgment ("Pilotin Decl."), Exhibit A-5.

[4] FAR 52.222-26(c)(8) (March 2007); *see also* Pilotin Decl., Exhibits A1-A5.

whether a contractor has engaged in compensation discrimination. Courts have long recognized the importance of prior salary and job history in evaluating pay disparities,[5] and there can be no serious contention that a compensation snapshot, including a wide variety of basic pay data (like salary and demographic information) from the review period is not only relevant, but *required*, to make a meaningful evaluation on whether pay practices are non-discriminatory. Similarly, Google's contention that contact information is not integral to OFCCP's investigation has no merit. Courts recognize that an investigation of pay disparity, or other discriminatory behavior, must necessarily involve interviews with those potentially affected.[6]

In sum, the Court's role here is very limited. If a request is outside the scope of Google's consent, then the Court could consider whether the request nonetheless was appropriate by operation of law. But to the extent the requests fall within the contract, this Court must enforce OFCCP's requests.

2) Even ignoring Google's clear consent, the Court must enforce the request as written absent a showing of undue burden that Google cannot meet.

OFCCP's written requests are often analogized to subpoenas[7] even though, unlike the administrative subpoenas at issue in seminal cases like *Lone Steer*, OFCCP contractors like Google have agreed to produce information to OFCCP *prior to* any request by the agency. In other words, Google is not a business that became subject to agency investigation by general act of Congress, it *affirmatively submitted* to OFCCP's investigations in exchange for taking federal funds. The only reasonable way to consider Google's resistance to OFCCP's requests is in the context of its prior, freely negotiated agreement.

Nonetheless, even where agencies issue subpoenas under acts of general applicability and where one party did not specifically agree to provide access and to be audited, courts have very

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[5] *See, e.g.*, *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (recognizing that prior salary could be a discriminatory factor in setting compensation).
[6] *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015).
[7] *See, e.g.*, *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 92 (D.D.C. 2011).

limited wiggle room to modify an administrative subpoena. As the First Circuit Court of Appeals explained, "[t]he role of a court in a subpoena enforcement proceeding is strictly limited to inquiring whether the above requirements [the subpoena is for a purpose authorized by law, the information sought is relevant to that purpose, not indefinite, and it was properly issued] have been met."[8] Critically, the reviewing court must refrain from interfering with the enforcement of the law by the duly authorized agency. "The judicial inquiry is narrow because '*judicial review of early phases of an administrative inquiry results in interference with the proper functioning of the agency and delays resolution of the ultimate question whether the Act was violated.*'"[9]

The targets of administrative subpoenas often resist enforcement of the subpoena on the ground that it is overly broad or unduly burdensome. Reviewing courts sometimes modify subpoenas to remove this burden, but "a court may modify or exclude portions of a subpoena only if the employer 'carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad.'"[10] Here, the requests are not unduly burdensome or unreasonably broad, and thus *cannot be modified by this court*, unless Google proves that producing the requested information "threatens to unduly disrupt or seriously hinder normal operations of a business."[11] Given that Google reviewed, negotiated and executed a detailed contract with the government *agreeing to produce the information sought by OFCCP*, Google's later contention that it would be too burdensome to comply with its bargain is of no moment. Google cannot pretend that it was unable to understand the terms to which it agreed, or that it expected to do anything less than comply with the terms of its contract.

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[8] *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989); *see Equal Employment Opportunity Comm'n v. S.C. Nat. Bank*, 562 F.2d 329, 332 (4th Cir. 1977) ("the role of the district court in an enforcement proceeding is sharply limited").

[9] *E.E.O.C. v. Fed. Exp. Corp.*, 558 F.3d 842, 848–49 (9th Cir. 2009) (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 n. 38 (1984)) (emphasis supplied).

[10] *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (quoting *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir.1980)).

[11] *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also U.S. E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009) ("Compliance with a subpoena is excused if it 'threatens to unduly disrupt or seriously hinder normal operations of a business'") (quoting *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986)).

Under the administrative subpoena enforcement analogy, the only way this Court could limit OFCCP's request is if this Court were to find that (1) Google did not consent to the request by contract (which they did) *and* (2) Google somehow persuaded this court that the requests are so unduly burdensome that modification is necessary to avoid unduly disrupting or seriously hindering Google's normal business operations.[12] This second showing is almost impossible to imagine given Google's significant resources.[13] Alphabet Inc., Google's parent company, has a market value of approximately $500 *billion*.[14] In its most recent SEC Form 10-K filing, Alphabet, Inc. reported revenues of $90 *billion* in 2016, the year of the compliance review.[15] In addition to Google's tremendous resources, Google acknowledges that "providing ways to access . . . information has been core to Google" since its founding, and that "[t]ransparency and open dialogue are central to how" Google deals with its employees.[16] For these reasons, Google has not contended, nor could it reasonably do so, that OFCCP's request would unduly disrupt its normal business operations.

3) The Secretary has delegated decision on how to conduct compliance reviews on OFCCP, not the ARB.

While both OFCCP and the Administrative Review Board, under which the Office of Administrative Law Judges operates, have functions delegated to them by Order the Secretary of Labor, the delegation of authority provided by regulation to OFCCP is plenary. 41 C.F.R. 1.2 unambiguously states that the Director "has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the Executive Order." The regulatory text contains no exceptions or caveats. Moreover, with respect to controversies

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[12] *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also U.S. E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009) ("Compliance with a subpoena is excused if it 'threatens to unduly disrupt or seriously hinder normal operations of a business.'") (quoting *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986))

[13] *E.E.O.C. v. McLane Co., Inc.*, No. CV–12–615–PHX–GMS, 2012 WL 1132758, at *2 (D. Ariz. Apr. 4, 2012) (noting courts must consider request in light of employer's resources).

[14] https://www.forbes.com/companies/alphabet/ last accessed on March 3, 2017.

[15] https://abc.xyz/investor/pdf/20161231_alphabet_10K.pdf, last accessed on March 3, 2017.

[16] *Id.*

related to the scope of documents requested in the context of a compliance review, the Regulations vest specific authority in OFCCP's Regional Director. They provide:

> The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis. . . . If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP District/Area Director. The OFCCP District/Area Director shall issue a ruling within 10 days. The contractor may appeal that ruling to the OFCCP Regional Director within 10 days. The Regional Director shall issue a final ruling within 10 days. Pending a final ruling, the information in question *must be* made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (g) of this section.

41 CFR 1.20(f) (emphasis added). Google made no appeal to the District Director or Regional Director in this case contesting the relevance of the documents. However, the Regional Director did review the requests and determined that they were relevant. By letter on November 9, 2016, Regional Director Wipper reiterated that "the materials the Agency has requested are clearly relevant to the Agency's evaluation of Google's compensation and hiring practices to determine compliance with Executive Order 11246, Section 503 and 38 U.S.C. § 4212, and their implementing regulations." Exhibit A.

The delegations of duty and the express provisions of the regulations make it abundantly clear that OFCCP, not the ARB, is responsible for the conduct of investigations under the Executive Order. This Court's limited role is to ensure requests are within the broad scope of authority provided to OFCCP—not to second guess OFCCP's use of its authority. Moreover, the regulations also contemplate that contractors must submit contested information to OFCCP pending a determination by the Regional Director of relevancy. As such, nothing in the regulations suggest any authority by the OALJ to invade OFCCP's investigatory functions and craft compromise requests.

4) Conclusion.

There is a very simple, very narrow question before the Court: do OFCCP's requests fall within the scope of Google's agreement to produce information? In answering this question,

there is no opportunity for the Court to engage in re-writing OFCCP's requests. Google's efforts to secure discovery and examination of OFCCP officials regarding why they requested various documents is wholly improper, not just in discovery, but also at the hearing. There is simply no evidence for the Court to "hear;" the only issue before the Court is ripe for decision. The Court should not exceed its mandate and second guess how OFCCP is conducting its investigation just to satisfy Google's curiosity.

Respectfully submitted,

Date: March 3, 2017

NICHOLAS C. GEALE
Acting Solicitor

JANET M. HEROLD
Regional Solicitor

IAN ELIASOPH
Counsel for Civil Rights

JEREMIAH MILLER
Senior Trial Attorney

UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Telephone: (415) 625-7769
Fax: (415) 625-7772
E-Mail: Pilotin.Marc.A@dol.gov

Exhibit A
OFCCP's Brief Re: Authority to Modify

OFCCP v. Google, Inc.
OALJ Case No. 2017-OFC-00004

U.S. Department of Labor

Office of Federal Contract Compliance Programs
Pacific Regional Office
90 Seventh Street, Suite 18-300
San Francisco, CA 94103

November 9, 2016

VIA EMAIL AND USPS

Matthew J. Camardella
Counsel
Jackson Lewis P.C.
58 South Service Road, Suite 250
Melville, NY 11747

Re: OFCCP Compliance Evaluation – Google Mountain View Facility

Dear Mr. Camardella:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) received your October 19, 2016 correspondence. In your correspondence, you request rescission of the Notice to Show Cause issued on September 16, 2016, on the basis that: (1) the Agency requested new information that was not previously requested, and (2) the Agency has not explained to Google why the information requested is relevant.

Contrary to your position, the Notice to Show Cause does not encompass new requests for information and records. Rather, as shown in the table below, the requests you claim are new are encompassed by requests the Agency made previously. In fact, the requests at issue represent the Agency's attempt to narrow and be more specific about the documents sought.

Purported New Request	**Original Request**	**Date of Original Request**
National origin/citizenship/visa status/place of birth for Google's workforce as of September 1, 2015, and Google's workforce as of September 1, 2014.	1. OFCCP requested National Origin for all applicants on 2/10/16. 2. OFCCP specifically requested citizenship, visa status and place of birth in the SCN on 9/16/16.	February 10, 2016 September 16, 2016
"Job Function" for Google's workforce as of September 1, 2015, and Google's workforce as of September 1, 2014.	1. OFCCP requested Job Function for compensation for the snapshot date on 12/21/15 and requested the prior year on 6/1/16. 2. OFCCP requested Job Function for applicants on 6/23/16.	December 21, 2015 and June 1, 2016 June 23, 2016

Purported New Request	Original Request	Date of Original Request
"Starting Job Function" for Google's workforce as of September 1, 2015, and Google's workforce as of September 1, 2014.	1. OFCCP requested all other compensation factors (including those previously requested) for 2014 and 2015 on 6/1/16. 2. OFCCP specifically requested "Starting Job Function" in the SCN on 9/16/16.	June 1, 2016 September 16, 2016
"All Stock Agreements" for Google's workforce as of September 1, 2015, and Google's workforce as of September 1, 2014.	1. OFCCP requested all other compensation factors (including those previously requested) for 2014 and 2015 on 6/1/16. 2. OFCCP specifically requested "All Stock Agreements" in the SCN on 9/16/16.	June 1, 2016 September 16, 2016
"All expressions of interest" for job openings in Job Groups 211, 212, 213, 214, 215 and 216.	1. OFCCP requested information on "All Applicants" on 2/10/16. 2. OFCCP specifically requested "All Expressions of Interest" in the SCN on 9/16/16.	February 10, 2016 September 16, 2016
Race and gender "for all expressions of interest" to Job Groups 211, 212, 213, 214, 215 and 216.	OFCCP requested race/gender information on all applicants on 2/10/16.	February 10, 2016
Applicant profile for each of the over 245,000 applicants to Job Groups 211, 212, 213, 214, 215 and 216.	1. OFCCP requested information on all applicants for job groups 211-216. 2. Additional factors for job groups 211-216 were requested on June 23, 2016. 3. OFCCP specifically requested "Applicant Profile" in the SCN on 9/16/16.	February 10, 2016 June 23, 2016 September 16, 2016
"Any other employee characteristics maintained" for Job Groups 211, 212, 213, 214, 215 and 216.	1. OFCCP requested information on all applicants for job groups 211-216. 2. Additional factors for job groups 211-216 were requested on June 23, 2016. 3. OFCCP specifically requested "Any other employee characteristics maintained" in the SCN on 9/16/16.	February 10, 2016 June 23, 2016 September 16, 2016

Purported New Request	Original Request	Date of Original Request
"Automated Resume Screen System"	OFCCP requested "Automated Resume Screen System" in the SCN on 9/16/16.	September 16, 2016
Instructional manual and screenshots for gHire.	1. OFCCP requested information on "All hiring policies, including factors that are important in hiring decisions" on 12/23/15. 2. OFCCP had a conference call with Jackson Lewis on 6/14/16 and requested the gHire instruction manual and screenshots. Jackson Lewis stated it was not sure it could provide the information and would check with Google.	December 23, 2015 June 14, 2016

Throughout the compliance evaluation process, the Agency has explained the relevancy of these requests and others for which Google has withheld materials. To reiterate, the materials the Agency has requested are clearly relevant to the Agency's evaluation of Google's compensation and hiring practices to determine compliance with Executive Order 11246, Section 503 and 38 U.S.C. § 4212, and their implementing regulations. Google has not offered any argument or explanation as to how the requested materials are not relevant to such an evaluation.

By November 16, 2016, please advise whether Google intends to produce the materials identified in the Notice to Show Cause. If you would like to discuss the requested materials' relevance further, I can be reached at (415) 625-7800 or wipper.janette@dol.gov.

Sincerely,

Janette Wipper
Regional Director

cc: Daniel Duff, Attorney, Jackson Lewis P.C. (daniel.duff@jacksonlewis.com)
Scott Williamson, Integrity Program Manager, Google (scwilliamson@google.com)

CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103. On March 3, 2017, I served the within

OFCCP'S BRIEFING REGARDING THE AUTHORITY OF THE ALJ TO MODIFY OFCCP'S REQUESTS

on the Defendant in this action via email addressed to:

Duff, Daniel V., III (Long Island) <Daniel.Duff@jacksonlewis.com>;
Camardella, Matthew J. (Long Island) <CamardeM@jacksonlewis.com>;
Sween, Lisa Barnett (San Francisco) <Lisa.Sween@jacksonlewis.com>
Suits, Eric E. (Sacramento) <Eric.Suits@Jacksonlewis.com>

Executed: March 3, 2017

/s/ *Jeremiah E. Miller*
JEREMIAH E. MILLER
Senior Trial Attorney

OFFICE OF THE SOLICITOR
UNITED STATES DEPARTMENT OF LABOR